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LABOUR STANDARDS IN A GLOBALISED ECONOMY SYMPOSIUM

Symposium: Labour Standards in a Globalised Economy

HENNER GÖTT — 2 November, 2015



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From 19-23 October 2015, EU and US negotiators met in Florida for the 11th round of bilateral negotiations on the envisaged Transatlantic Trade and Investment Partnership (TTIP). What is often referred to as the largest free trade agreement in history is actually far more than that: The agenda encompasses not only ‘traditional’ trade barriers ‘at the border’, but also wide-ranging provisions on domestic regulation and regulatory cooperation as well as chapters on a range of trade-related issues, including intellectual property, investment protection, competition, sustainable development, and more. One of the many issues discussed in

the current rounds of these ‘free trade +’-negotiations is the protection and promotion of labour standards in the envisaged transatlantic free trade area.

The latest round of TTIP negotiations highlights the more fundamental issue of how international labour standards can be protected and promoted in contemporary international economic law. A deeper understanding of labour standards and its interplay with economic law and policy is needed both in current free trade negotiations and in international economic law more generally. Particularly because major economic endeavours like TTIP provide an opportunity to bring about substantial improvements, a comprehensive debate on the role and function of labour standards in international economic law is the order of the day. This debate will necessarily not only touch on ‘technical’ questions, but is likely to address more fundamental aspects of social justice and fairness in globalisation.

A broad range of topical issues in this field was brought to intense and fruitful debate at the Göttingen Conference on Labour Standards in International Economic Law, hosted by the Institute of International and European Law’s Department of International Economic and Environmental Law at the University of Göttingen, Germany. I am extremely happy and grateful that the Völkerrechtsblog has offered to bring some of the topics discussed in Göttingen to the blogosphere, providing a unique opportunity to revive and continue our discussions and to invite the readers of the Völkerrechtsblog to join. It is my hope that this series of contributions will help to bring the topic to the attention of a wider audience and to foster the debate on the Völkerrechtsblog and beyond.

Labour in Free Trade Negotiations – (Don't) let sleeping dogs lie

Protecting and promoting labour standards in a globalised economy has been a contentious issue for over a century. Especially during the last three decades, both the US and the EU have been active promoters of labour standards in international economic law, including an (eventually unsuccessful) attempt to introduce a 'social clause' in WTO law, the inclusion of labour provisions in a growing number of bilateral and regional trade agreements and labour conditionality in unilateral trade preference schemes for developing countries, to name but some. In most instances, this policy has been preceded or accompanied by policy campaigns by non-state actors, particularly trade unions and NGOs.

Whereas both the US and the EU have been significantly more committed than many other states to include labour issues in their respective trade and investment policies, labour standards have nevertheless hardly ever played more than a featuring part there. Given the presumed motivation of trade policy-makers, this lack of emphasis does not really come as a surprise. To put it bluntly, free trade negotiations are not labour negotiations, and the intrinsic incentive of negotiators to risk a trade deal for the sake of ensuring ambitious labour protection might be rather limited. In current EU free trade negotiations, labour is an also-ran, one aspect of sustainable development, and as such struggling for attention against both trade and investment issues and 'the other' (and currently arguably dominating) sustainable development aspect, the protection of the environment.

Apart from being only one in many aspects to negotiate, provisions referencing labour issues are also a treacherous gateway to the often quite separate and distinct cosmos of international labour law and policy. This cosmos has its own ideational foundations, institutional arrangements, substantive and procedural legal frameworks and political dynamics – and its own record of unresolved issues and open fundamental questions about social justice and fairness in globalisation. Being too ambitious on labour might thus, from a trade negotiator's view, overburden trade negotiations and endanger their eventual success. Indeed, a more ambitious approach to labour would entail pronounced debates on a range of highly complex questions, forcing the parties to discuss underlying values and the collective purpose of their endeavour – issues that lie beyond the initial free trade/liberalisation agenda. It might hence be tempting to leave trade agreement provisions on contentious labour issues in a state of 'productive ambiguity', or even to avoid them entirely if possible.

Arguably, it is too early to resign over TTIP's account on labour. Yet, despite some 60 free trade agreements have addressed labour issues in one or the other way during the last two decades, the record of success stories has been rather modest. Recent accounts, e.g. the CETA-Draft's labour chapter (Ch. 24), while showing relative progress in some areas when compared to earlier agreements, still have a considerable potential to miss the mark, inter alia because the relative progress made as to substantive obligations and civil society participation mechanisms is not accompanied by an equally progressive institutional and procedural setting to secure performance. Thus, if TTIP is really meant to live up to its promise to be an ambitious and standard-setting agreement with robust and sustainable labour

protection, there arguably has to be more ambition in the first place. Negotiators, for better or for worse, will have to overcome their largely self-induced reluctance and self-restraint and draft labour provisions that go even further than the latest European accounts.

The challenge of complexity – approaching a maze of open questions and stumbling blocks

That being said, enhancing labour protection in free trade agreements, and in international economic law and policy more generally, is certainly nothing to be done along the way. Nor is it the task of diplomats alone: Scholars, practitioners, stakeholders, interest groups and the wider public all need to make their contribution in defining the role and position that labour issues and labour standards ought to have in the future world economic order.

Analysing and assessing the role and position of labour standards in international economic law raises complex and interrelated socio-political, economic, legal and even philosophical questions. Scope-wise, the debate reaches well beyond trade agreements or other specific projects. As Claire La Hovary will highlight, international labour standards themselves are not to be taken for granted, but are subject to contestation and re-definition even within the sphere of the International Labour Organization (ILO), still the principal forum for the creation and proliferation of international labour standards. As to the conceptualisation of labour standards in instruments of international economic law, Tonia Novitz will point to a recent shift in EU agreements from treating labour standards in terms of human rights to treating them as a facet of the broader concept of sustainable development. In terms of

implementing those labour standards that have been taken up by trade instruments, the debate has frequently centred on the question whether or not trade sanctions should be available in case of violation of labour obligations. As Lore Van den Putte will argue, this ‘buddy vs. bully approach’ appears too narrow and needs to be transcended. Drawing on experiences made under US trade agreements, Patrick Abel will point at systemic deficiencies which have prevented labour dispute settlement mechanisms in free trade agreements from living up to their promise. Subsequently, I will address the prospects of improving these mechanisms by installing individual complaints procedures for direct claims by trade unions, employers, NGOs or other non-state actors. Addressing non-state actor initiatives, being a source of optimism for quite some, Nazli Aghazadeh will highlight the benefits, but also the deficits of social labelling schemes.

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